Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 2002

Keith Yohn,

Petitioner,

v.

State Officers of Michigan David A. Brandon, Regent; Laurence B. Deitch, Regent; Daniel D. Horning, Regent; Olivia. P. Maynard, Regent; Rebecca McGowan, Regent; Andrea Fischer Newman, Regent; S. Martin Taylor, Regent; Katherine E. White, Regent; and their managerial agents William E. Kotowicz, Dean; Robert J. Feigal, Interim Assoc. Dean; Christian S. Stohler, Dept. Chairman; Brian H. Clarkson, Dept. Chairman; Merle A. Jaarda and Kenneth W. Stoffers, Co-Course Directors; in their individual capacities at State University in Ann Arbor,

Respondents.

On Petition for a writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Keith Yohn
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39 pp

QUESTIONS PRESENTED

I.

Is a scholastic grade entitled protection under the Freedom of Speech clause of the First Amendment to the United States Constitution ?

A. Does the university's four academic freedoms rise to the level of a teacher's guaranteed constitutional freedom ?

B. Do contractual relationships exist in the Regents' Bylaws ?

C. Does a scholastic grade send a message to a student ?

II.

Whether it was plain error when the Magistrate dismissed my 42 U.S.C. sec. 1983 "Free Speech" claim without considering the Regents' and/or their managerial agents' (University administrators') reason(s) for vacating the "F" grades a panel of four professors assigned to students performing a competency examination.

A. Are the University administrators' legitimate pedagogical reasons for restricting petitioner's speech established in the record ?

QUESTIONS PRESENTED
(continued)

III.

Whether the lower courts erroneously followed an overly broad opinion that collide with a well established custom in education and a U.S. Supreme Court decision to dismiss my 42 U.S.C. section 1983 claim.

A. How do professors officially communicate their professional judgment of a student's learning progress to the student?

B. Does the administration play an active role in determining the learning progress of a student?

C. What gives the administration the right to at their whim arbitrarily manipulate a professor's assigned grade?

D. What are some factual circumstances that must exist for the Regents and/or their agents to manipulate a professor's assigned grade without the professor's consent?

IV.

Whether a health care professor has a duty to protect an unsuspecting public and their children from an unskilled or incompetent dental student who may jeopardize public health and safety.

QUESTIONS PRESENTED
(continued)

A. Is a student admitted to the predoctoral dental program guaranteed a Doctor of Dental Surgery Degree ?

B. Why should faculty care if their professional judgments about a student's skill or competency are recorded or not ?

C. Are patients concerned about having a dentist with inflated grades working in their mouths and the mouths of their children ?

V.

Whether agents acting for the Regents can violate the faculty's written policy statement for students removing their academic deficiencies and arbitrarily vacate the "F" grades a panel of four professors unanimously assigned to students performing a competency examination and give the students passing grades did restrict the professors' "Free Speech" freedom to assign "F" grades to dental students.

A. Can the Regents artificially promote a student into the next higher class level by giving the student an inflated grade ?

B. Does the university lose its credentials when agents acting for the Regents do not follow the university's written grading policy ?

QUESTIONS PRESENTED
(continued)

C. Is the university dependent on a professor's assigned grade recorded on the student's transcripts ?

D. Does inflating a student's grade teach the student to accept lower standards, whine, cheat, lie, and steal ?

E. Are agents acting for the Regents proxy for and speak for the Regents ?

F. Is the public's trust in a honored institution undermined when the Regents confer a health care degree on a student with inflated grades ?

G. Are the Regents accountable for the actions of their agents (University administrators) who abridge a professor's civil freedoms and endanger public health and safety ?

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In The

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October Term, 2002

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

CITATIONS TO OPINIONS BELOW

For cases from **federal courts:**

The Report and Recommendation of the Magistrate appears at Appendix A to the petition.

The opinion of the United States District Court for the Eastern District of Michigan Southern Division appears at Appendix B to the petition and is unpublished.

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix C to the petition and is unpublished.

CONCISE STATEMENT RE JURISDICTION

For cases from **federal courts:**

The date on which the United States District Court for the Eastern District of Michigan Southern Division decided my case was May 7, 2001. An appeal of right was made to the U.S. Court of Appeals for the Sixth Circuit on May 14, 2001. The date on which the United States Court of Appeals for the Sixth Circuit decided my case was June 24, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1) pertinent part reads:

> **Courts of appeals; certiorari; appeal; certified questions**
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Supreme Court Rule 10

> Rule 10(a) relevant part says:
> A United State court of appeals has entered a decision in conflict with the decision of another United States court of Appeals on the same important matter;
> Rule 10(c) says:
> a state court or a United States court if appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions if this Court.

Keith Yohn, petitioner in this cause, brought this action under the Freedom of Speech clause of the First Amendment and Fourteenth Amendment to the United States Constitution, alleging a violation of free speech and emotional distress. Jurisdiction in the federal district court was pursuant to 28 U.S.C. sections 1331, 1343(a)(3)(4), and 1367(a).

The standard of review in academic disputes is if the Court perceives that the plaintiff was deprived of either a "liberty" or a "property" interest or whether the "action was arbitrary or capricious." *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 82, 91 (1978).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US CONST, AM I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is a civil rights action brought by the petitioner, Keith Yohn, to redress the "Free Speech" restrictions arbitrarily imposed by the Regents and their managerial agents at the University of Michigan, School of Dentistry.

The case is about grade inflation, public health and safety, public policy, The First Amendment to the United States Constitution and the well established custom in education of a teacher judging the learning progress of a student and communicating this judgment without a governing board, board member, managerial agent, administrator, staff person, parent, or other teacher arbitrarily interfering in the teacher-student relationship.

The undisputed facts in the record that provoked my stand show the Regents, who govern the University of Michigan by a statutory scheme of government, set in place Regents' Bylaw 5.03 which vest the governing faculty of each school and college with plenary powers to make rules and regulations concerning grading regulations.

Pursuant to Regents' Bylaw 5.03 the governing faculty of the dental school voted in place a written document for scholarship and promotion. This document was revised and approved by the governing faculty in July, 1995.

The document states that only the Executive Committee of the School of Dentistry has the right to modify or make exception to these policies at its discretion. The document includes a policy for the remediation of students with academic deficiencies.

The policy states that a student performing unsatisfactorily will be allowed to take only two (so called) re-examinations to remove an unsatisfactory grade. The policy further states, "that if the first re-examination results in an E grade, a second re-examination may not be taken." The document list seven conditions under which a student maybe dismissed from the School of Dentistry and an appeal procedure when these conditions are triggered. One of the conditions for dismissal is when a student receives two E or F grades in the same didactic, clinical foundation (preclinical) course or clinical subject or course content. Under this policy an "E" grade equals a "F" grade.

Two dental students received "F "grades in a regular clinical foundation course given in the winter term 1999 and a remedial course given in the summer term. The students faced dismissal from the School of Dentistry. In August 1999, the students invoked the School of Dentistry's appeal procedure and appeared before the School of Dentistry's Academic Review Board I (ARB I) for a determination of their student status. The ARB I recommended that the students repeat the clinical foundation course during the winter term 2000.

The students were not happy with ARB I's recommendation and appealed to the School of Dentistry's Executive Committee (EC) and Dean Kotowicz for review of their dental student status. On September 8, 1999, the EC reviewed the students academic deficiencies and the School of Dentistry's document for scholarship and promotion and over ruled the recommendation of ARB I. The EC authorized a special remedial course for the two students to begin in the fall term 1999 and charged Interim Associate Dean Feigal to implement and coordinate the remedial course under the School of Dentistry's written statement for scholarship and promotion.

Associate Dean Feigal's plan under the document for scholarship and promotion was to begin the remedial course during the week of September 13-17. The students were required to complete 24 half day sessions of practice and pass two separate examinations. The scoring of the two separate exam projects would be done by a panel of four faculty members experienced in grading regular clinical foundation course examinations. The students' typodonts (manikin like teeth and jaws) would be coded to ensure anonymity in the grading process.

On October 1, 1999, the two students performed the first exam project. The exam consisted of clinical simulated exercises so that the students could prove that they had the skills and competencies to be promoted to the next higher class level.

The students completed the temporary bridge restoration component of the exam project in white acrylic, with the approval of an exam proctor, because a colored acrylic different than white was not available. Colored acrylic is used solely to keep the students from cheating.

On October 6, 1999, at approximately 1:30 P.M., Feigal arrived at the pre-clinic office carrying written criteria grading sheets and coded typodonts #36 and #84 with the students' exam projects on them. A panel composed of Drs. Keith Yohn, Kyle Pullen, Geoffrey Gerstner, and William Daines from the regular clinical foundation course were chosen by co-course directors Jaarda and Stoffers to score the exam projects.

After two and a half hours of scoring, the results showed that out of a possible 50 points student # 36 earned 10.4 points and student # 84 earned 27.34 points. To receive a C- grade on the examination the students needed to earn at least 35 points. The unanimous decision of the four faculty members was that students #36 and #84 should receive "F" grades on the first examination in the executive committee's remedial course and that the remediation for the two students should stop.

At approximately 4:30 P.M. the "F" grades and unanimous decision of four faculty members that students #36 and #84 had failed the first exam project was reported to Feigal.

Feigal did not report to the EC that students #36 and #84 had failed the first exam project and did not have the "F" grades assigned to the students by the panel of four faculty members recorded on the students' academic transcripts for the EC's remedial course.

On October 7, 1999, Feigal vacated the "F" grades assigned to the two students by the panel of four faculty members and sent the faculty members an e-mail message saying that "I am having the students redo temporary bridges on their typodonts, with colored acrylic..." and "the projects were not graded anonymously," and "Faculty, including one of your course directors, will then score the group of projects."

On the morning of October 20, 1999, the co-course directors and the four faculty members made an agreement that the "F" grades on the examination would stand, the students would not be allowed to redo the temporary bridge project, the remediation of the two students should stop, and the students should repeat the course in the winter term 2000 as recommended by ARB I.

On the same day at 1:14 P.M. chairman Stohler sent an e-mail message to Dean Kotowicz and Associate Dean Feigal stating: "attached are the conclusions of the discussion that occurred this morning. The faculty has reached an unanimous decision."

Dean Kotowicz did not inform the EC of the decisions and recommendations of the faculty members. Instead, on October 21, Dean Kotowicz called Stohler from Hawaii and ordered Stohler to find a solution to this matter.

On October 22, 1999, Stohler, acting on the order of Kotowicz, called a meeting with Feigal, Clarkson, Jaarda, Stoffers, and the two students. At this meeting the two students presented their case and discussed their complaints with the administrators. After the students left the room Feigal, Clarkson, Jaarda, and Stoffers proposed that the two students be given more practice sessions and perform the second examination.

On or about October 25, 1999, the students were told by Feigal that Dr. Mark Snyder would supervise their practice sessions for the next 3-4 weeks and after these practice sessions they would be allowed to take a second examination.

On or about November 5, 1999, students #36 and #84 performed the prohibited and different second examination. On November 8, 1999, Jaarda and Stoffers graded the second examination and gave the two students unwarranted passing grades.

On November 18, 1999, chairman Clarkson sent an e-mail message to Stoffers and told Stoffers that "you (Stoffers) and Merle (Jaarda) should give the two students the passing grades."

On or about December 9, 1999, Jaarda submitted the passing grades to the dental school registrar in place of the "F" grades assigned to the students by the panel of four faculty members.

The EC did not authorize Kotowicz, Feigal, Stohler, Clarkson, Jaarda, or Stoffers to vacate the "F" grades assigned by the panel of four professors on the first examination, to abort the EC's remedial course or give the students more practice sessions and a prohibited second examination.

The students were promoted into the next higher class level. On May 12, 2001, the regents conferred a Doctor of Dental Surgery degree on the students.

ARGUMENT

A scholastic grade is one of the most sought after jewels in education. Students receive distinction and high praise for a good grade. Courts have called a scholastic grade: a professional judgment; an achievement; a reward; a teaching tool; a currency; and a stock in trade.

Teachers expend a lot of time, energy, and emotional distress in determining a student's grade. A student spends a lot of money, time, energy, anxiety, and will risk lying, cheating,and stealing to get a good grade. The university depends on a professor's assigned grade recorded on a student's transcript to certify to employers, graduate schools, licensing boards and the public a students successful or unsuccessful completion of a course of study.

Despite the high value placed on a scholastic grade, United States Court of Appeals in the circuits clash on how much protection a scholastic grade should receive.

For example: the First circuit court of appeals in *Lovelace v. Southeastern Massachusetts University,* 793 F. 2d 419,426 (1st Cir. 1986), though not decided -- noted:

> Plaintiff also contends that the Federation Agreement guaranteed him academic freedom and this guaranty was violated by the university's alleged action in attempting to coerce plaintiff to alter grades. If that were so, plaintiff at most would state a contract claim, not a constitutional one. *supra* at 426 n.2

The court of appeals for the Third Circuit in *Brown v. Armenti,* 247 F. 3d 69 (3rd Cir. 2001) the court in rejecting the Sixth circuit's Parate v. Isibor, 868 F. 2d 821 (6th Cir. 1989) decided:

> Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught. We therefore conclude that a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures. *supra* at 75.

In a dispute over a grading incident, where a department chairman ordered a professor to give a student a "B" grade in an art course before the course began *Hillis v. Stephen F. Austin State University, et al.,* 665 F. 2d 547 (5th Cir. 1982) the court said:

> Academic freedom is an amorphous field about which a great deal has been said in esoteric law journal articles and academic publications, but little determined in explicit, concrete judicial opinions. This is nearer the mark. While academic freedom is well recognized, *e. g. Healy v. James,* 408 U.S. 169, 180-81 (1972); *Keyishian v. Board of Regents,* 385 U.S. at 603 (1967), its perimeters are ill-defined and the case law defining it is inconsistent. Its roots have been found in the first amendment insofar at it protects against infringements on a teacher's freedom concerning classroom content and method. *e.g. Regents of University of California v. Bakke,* 438 U.S. 265, 311-314 (1978). (long list of other citations omitted) *supra* at 553.

In *Parate v. Isibor,* 868 F. 2d 821 (6th Cir. 1989), the Sixth circuit court said:

> A letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled to some measure of First Amendment protection. ... the individual professor's assignment of a letter grade is protected speech. The university professor must remain free to exercise his independent professional judgment in the assignment of grades and the evaluation of his students' academic progress. *supra* at 827-28.

In a case, where a professor and a student became embroiled in a disagreement over optional and mandatory class assignments. The turmoil ended in a bitter exchange of unprofessional, insulting, and degrading, letters resulting

in the professor giving the student a "F" grade for the course. The Seventh circuit court in *Keen v. Penson,* 970 F. 2d 252 (7th Cir. 1992) said:

> Academic freedom prohibits state actions that "cast a pall of orthodoxy over the class room," As this case reveals, the asserted academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor. This Court has recognized the supremacy of the academic institution in matters of curriculum content. *supra* at 257 (citations omitted).

In a case involving a dispute between a school teacher and a principal over the teacher's teaching methods and grading procedures, the Eight circuit in *Berg v. Bruce,* 112 F. 3d 322 (8th Cir. 1997) held:

> Academic freedom is designed to 'protect the individual professor's classroom method from the arbitrary interference of university officials.' citing *Parate v. Isibor,* 868 F. 2d 821 (6th Cir. 1989) *supra* at 329.

Thus, herein lies the controversy. Can a capricious or tyrannical governing board of a college or university and their subordinate agents arbitrarily and at their whim manipulate a student's grade without the professor's consent ? If this is so, then the quality of education in the United States would decline, the concept of merit would disappear, and democratic ideals would vanish from the academy.

REASONS FOR GRANTING THE WRIT

1. There is conflict and confusion in the circuit courts of appeals as to whether a scholastic grade is entitled protection under the Freedom of Speech clause of the First Amendment. This Court needs to settle the law on this issue.

2. The Court should narrow the common law of pedagogy to prevent a governing board and their subordinate agents from restricting a professor's "Free Speech" freedom.

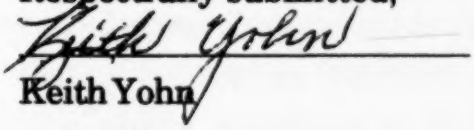
3. This case presents issues important to Public Health and Safety.

4. This case presents a substantial federal question affecting education and millions of teachers in this country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: July 15, 2002.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEITH YOHN,

Plaintiff, CIVIL ACTION NO. 99 CV 75997 DT

v. DISTRICT JUDGE VICTORIA A. ROBERTS

MAGISTRATE JUDGE VIRGINIA MORGAN

BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN, et al.,

Defendants.
_____/

REPORT AND RECOMMENDATION

Introduction

This is a 42 U.S.C. section 1983 suit in which plaintiff, a university professor, claims that defendants interfered with his First Amendment right of academic freedom. Plaintiff has also brought state law defamation and emotional distress claims. The defendants are the Regents of the University of Michigan; William E. Kotowicz, the Dean of the University of Michigan School of Dentistry; Robert J. Fiegal, the interim Associate Dean; Christian S. Stohler, the Department Chairman of Biologic and Material Sciences; Brian H. Clarkson, the Department Chairman of Cariology, Endodontics, and

Restorative Dentistry; Merle H. Jaarda, an Associate Professor; Kenneth W. Stoffers, a professor; and Daniel Sharphorn, the Assistant Counsel of the University.

The matter comes before the court on Defendants Motion to Dismiss and/or [for] Summary Judgment Under Fed.R.Civ.P. 12 (b) (1), (b) (6), and 56. The court heard oral argument on the motion on November 8, 2000. For the reasons stated below, the court recommends granting the motion, dismissing the complaint, and entering judgment in defendants' favor with regard to plaintiff's section 1983 claim.

Background

Plaintiff is a tenured Associate Professor at the University of Michigan School of Dentistry. In early October of 1999, plaintiff was chosen as one of four professors to serve as panel members to score the practical projects of two dental students enrolled in a clinical course. Both students were repeating the course, having failed it on a prior occasion. The practical project consisted of crafting a temporary bridge out of acrylic material. After the students completed the project, the faculty panel met to discuss the students' efforts. After deliberating for approximately two and one-half hours, the panel unanimously agreed that both students had failed the test, which corresponded to a letter grade of "F" in the dental school's grading system.

On October 6, 1999, the panel reported to defendant Fiegal, [sic] the interim Associate Dean of the School of Dentistry, that both students earned an "F" on the practical exam. The following day, Fiegal informed the panel members, including plaintiff, that the students would be allowed to redo the temporary bridges and that they would be graded by other faculty members. The students redid the the temporary bridges and were given passing grades.

The "F" grades originally awarded by the panel were never recorded on the students' official transcripts.

After the students took the test, plaintiff had discussions and meetings with various members of the dental school faculty, including defendants Kotowicz and Feigal, regarding the students' performance and the panel's decision to award them "F" grades. He alleges at some time during these discussions, Kotowicz and Fiegal [sic] "intentionally verbally abused plaintiff in a manner that was extreme, outrageous, and unjustified, and placed them self [sic] in a position of authority over plaintiff arousing feeling of anger, shock, humiliation, and intimidation causing emotional distress...." Plaintiff's Third Amended Complaint. Paragraph 55.

In late December of 1999, plaintiff served defendant Stoffers with a summons and a copy of the complaint in this matter. According to plaintiff, Stoffers then went to Kotowicz and stated that he had been threatened by plaintiff. A few days later, Stoffers told defendants Stohler and Jaarda, as well as one of plaintiff's former students, that plaintiff had threatened him and that he no longer trusted plaintiff and had no confidence in his teaching abilities. These allegations form the basis of plaintiff's defamation claim against Stoffers.

Plaintiff next alleges that defendant Sharphorn, the Assistant General Counsel of the University, defamed him by stating in a memo to Kotowicz that Plaintiff may have violated the Family Educational Rights and Privacy Act by disclosing certain information about the two students during the course of this lawsuit.

Lastly, Plaintiff alleges that Kotowicz defamed him in a letter written to and published in the January 17, 2000, issue of The University Record, a school newspaper. The letter was published in the February 10, 2000, issue of the Ann Arbor News. In the Letter, Kotowicz stated the following, in part: "The process involved in the grading of two dental students at the University has recently received

public attention and comment following the filing of a lawsuit by a member of the School of Dentistry Faculty.... The University has an obligation to observe the educational privacy rights of all of its students... [and] the dean does not unilaterally determine grades." Through Kotowicz did not specifically identify plaintiff in the letter or directly disparage him, it is plaintiff's contention that he was defamed because "[t]he public knows who the Dental School faculty member is in Kotowicz's letter. Kotowicz implies that the faculty member has violated the privacy rights of the two dental students and misleads the reader into believing that he played no part whatsoever in the grading process of the two dental students." Plaintiff's Third Amended Complaint. Paragraph 75.

Discussion

Defendants have raised various grounds for dismissal. The court needs reach only one. For the reasons stated below, the court recommends dismissal of plaintiff's 42 U.S.C. section 1983 claim because he has failed to state a claim on which relief can be granted. Should that claim be dismissed, the court has no basis to retain jurisdiction over the remaining claims as they arise under state law. It is therefore recommended that they be dismissed without prejudice permitting plaintiff to file them in state court.

1. Motion for Judgment on the Pleadings

Defendants stated in their motion that they were moving for dismissal under Fed.R.Civ.P. 12(b) (6) on the grounds that plaintiff had failed to state a claim on which relief could be granted. The court docket indicates that defendants answered plaintiff's complaint on January 19, 2000. As a technical matter, a motion for failure to state a claim on which relief can be granted under rule 12 (b) (6)

must be made before answering the complaint. As a practical matter, it makes little difference, as the court may consider the motion as one for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c), and a 12(c) motion is evaluated under the standard applied to a 12 (b) (6) motion. See Fed.R.Civ.P. 12 (h) (2), see also Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 n. 2 (6th Cir. 1988).

A motion to dismiss under Rule 12 (b) (6) "test whether a cognizable claim has been pleaded in the complaint." Scheid, 859 F.2d at 436. For the purposes of such a motion, the facts alleged in the complaint must be taken as true. Id. The claim should be dismissed only if it "appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quoting Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983); see also Conley v. Gibson, 355 U.S. 41 (1957).

Plaintiff contends that one or more of the defendants' violated his First Amendment right of academic freedom by refusing to accept and record on the students' transcripts the "F" grades they received from the grading panel, which consisted of plaintiff and three other dental school faculty members. It is clear that plaintiff brings this claim with the most meritorious of purposes: to ensure that the process by which the University of Michigan grants degrees reflects the integrity that the public has a right to expect from an honored institution. But the purpose alone is not sufficient to prevail if the case law does not entitle plaintiff to relief.

Defendants argue that plaintiff has failed to state a claim on which relief can be granted because he has no constitutionally protected interest in the grade ultimately received by a student. In support of the argument, defendants rely principally on Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).

In that case, Natthu Parate, an associate professor in the Civil Engineering Department at Tennessee State University ("TSU"),

filed suit under section 1983 alleging that several university officials violated his First Amendment right to academic freedom.[1] In the fall of 1982, Parate taught a "Groudwater and Seepage" course. Parate informed students at the beginning of the semester of the grading criteria. Students who earned at least 90 percent of the total coursework [sic] points would receive a letter grade of "A." Those that earned between 80 and 90 percent of the total points would receive a "B," and so on. Parate also informed the students that he was willing to adjust a letter grade if a student had extenuating circumstances.

After Parate distributed final grades at the end of the semester, one of his students, who earned 86.4 percent of the course points and a letter grade of "B," asked that the grade be changed from "B" to "A."[2] Parate refused because he saw the student cheat on a portion of the final examination and because the student provided Parate with false medical excuses for his failure to perform class work and/or attend class. Parate discussed the student's request with Michael Samuchin, the Head of the Department of Civil Engineering. Samuchin concurred that a grade change was not in order.

Not satisfied with Parate's response, the student pressed his claim for a grade change with Edward Isibor, the Dean of the School of Engineering and Technology. Isibor requested a meeting with Parate over the matter. At the meeting, Isibor instructed Parate to change the student's grade to an "A." Isibor also insisted that Parate sign a memorandum indicating that the grading scale for the "Groundwater and Seepage" course had been changed so that a number of 86 corresponded to a letter grade of "A." Parate refused to

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[1] The plaintiff also raised a due process claim as well as several state law claims. Discussion of those claims has been omitted because they are not germane to the resolution of defendants' motion to dismiss.

[2] It is not clear from the Sixth Circuit's opinion the reasons the student thought his grade should be changed.

comply with Isibor's demands The following day, Samuchin met with Parate and asked him to sign a memorandum changing the grade scale and the student's grade to an "A." Parate signed the memorandum, but added a notation thereto: "as per instructions from Dean and Department Head at meeting." Samuchin met with Parate later that day and presented the same memorandum for Parate's signature, but without the notation. Samuchin told Parate that if he did not sign the retyped memorandum, his performance evaluations would be negatively affected. Parate signed it, but changed his signature to signify his protest. Samuchin later returned with yet another retyped memorandum. Parate reluctantly signed it, fearing future reprisals from Isibor. Isibor and Samuchin retaliated against Parate after the grading incident. They criticized his teaching methods. impeded his research efforts, and otherwise interfered with Parate's performance of his duties.

After Parate left TSU, he sued, among others, Isibor and Samuchin, claiming that they violated his right of academic freedom when they compelled him to change the student's grade. Plaintiff's claim was dismissed on summary judgment. On appeal, The Sixth Circuit reversed the district court's judgment.

The Sixth Circuit recognized that a university professor's assignment of a grade was entitled to First Amendment protection:

> The individual university professor may claim that his assignment of an examination grade or a final grade is communication protected by the First Amendment. As does any communicative act, assigning a letter grade sends a message to the recipient. the message communicated by the letter grade "A" is virtually indistinguishable from the message communicated by a formal written evaluation indicating "excellent work." Both Communicative acts represent symbols that transmit a unique message.
>
> Because the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled to come measure of First Amendment protection.

Parate, 868 F.2d at 827. Thus, "[a]though the individual professor does not escape the reasonable review of university officials in the assignment of grades, []he [sic] should be free to decide, according to [his] own professional judgment what grades to assign and what grades not to assign." Id. at 828. The Sixth Circuit further noted that because the First Amendment encompasses the freedom to remain silent as well as the freedom to speak, Riley v. National Fed'n. of the Blind of N.C., 487 U.S. 781, 796-97 (1988). a professor"may not be compelled, by university officials, to change a grade that the professor assigned to [a] student. Because [a] professor's assignment of a letter grade is protected speech, the university officials' action to compel the professor to alter the grade would severely burden a protected interest." Parate, 868 F.2d at 828.

Applying these principles, the Sixth Circuit held that Isibor an Samuchin violated Parate's First amendment right of academic freedom when they forced him to sign the grade change memoranda. In reversing the grant of summary judgment, the Court concluded that the district court misconstrued Parate's claim in its analysis:

> [T]he district court construed Parate's claim as being based on a First Amendment right to see that [the student] ultimately received the [Groundwater and Seepage] course grade that Parate originally assigned him, and the alleged constitutional violation occurred when the grade was changed. However, based on the foregoing analysis, we conclude that the constitutional issue was mischaracterized below. The defendants' act of *ordering Parate* to change the grade, rather than the act of giving [the student] a different grade that Parate desired, gives rise to the constitutional violation.
> Parate, 868 F.2d at 829.

Here, plaintiff's claim is precisely what the district court erroneously construed Parate's claim to be -- that a professor has a protected First Amendment right not only to assign a letter grade to a student, but also to have that grade accepted by the

administration and officially recorded in the university's records. In other words, plaintiff's claim rests on the contention that university officials have no authority to change a student's grade over the objections of the professor who awarded the grade. The Sixth Circuit squarely rejected that argument in Parate, 868 F.3d [sic] at 829:

> Parate correctly contends that even as a nontenured professor, he retains the right to review each of his students' work and to communicate, according to his own professional judgment, academic evaluations and traditional letter grades. Parate, however, has no constitutional interest in the grades which his students ultimately receive. If the defendants had changed [the student's]...course grade, then Parate's First Amendment rights would not be at issue. Parate's First Amendment right to academic freedom was violated by the defendants because they ordered Parate to change [the student's] original grade. The actions of the defendants, who failed to administratively change [the student's] grade themselves, unconstitutionally compelled Parate's speech and precluded him from communicating his personal evaluation to [the student].

The sum and substance of plaintiff's claim in the instant case is that one or more of the defendants violated his right of academic freedom by changing, over his objection, the grades given to two students by plaintiff and the other members of the grading panel. Plaintiff does not allege that any of the defendants attempted to strong-arm him into changing the grades, as did the defendants in Parate. Rather, the grade was changed administratively for reasons not clear on this record. Because plaintiff had no constitutionally protected interest in the grade actually received by the students and he was not forced to change the grade, his claim must fail under Parate. Plaintiff acknowledged Parate, but failed to distinguish it in any meaningful manner. The case is directly on point and dispositive of plaintiff's section 1983 claim as pled. Accordingly, the court, although respecting plaintiff and his argument, is constrained to

recommend that the section 1983 claim be dismissed, as it is beyond doubt that "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheid, 859 F.2d at 436 (citation omitted).

2. State Law Claims

Plaintiff also pleaded state law claims in his complaint and he contends that the court should exercise supplemental jurisdiction over the claims pursuant to 28 U.S.C. section 1367. The court disagrees. In general, "if the federal claims are dismissed before trial,... the state claims should be dismissed as well." Taylor v. First of America Bank-Wayne, 973 F.3d [sic] 1284, 1287 (6th Cir. 1992) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Section 1367 (c) (2) specifically provides that a court may decline to exercise supplemental jurisdiction over state law claims if "the district court has dismissed all claims over which it has original jurisdiction." The court has recommended dismissal of plaintiff's federal claim, and there are no compelling reasons for the court to retain jurisdiction over his state law claims. Thus, it is recommended that the district court dismiss them without prejudice.

Conclusion

For the reasons stated herein, the court recommends **GRANTING** defendants' motion to dismiss with regard to plaintiff's 42 U.S.C. section 1983 claim. The court further recommends that plaintiff's state law claims be **DISMISSED WITHOUT PREJUDICE.**

The parties may file objections to this Report and Recommendation within ten (10) days of service of a copy hereof, as provided for in 28 U.S.C. section 636 (b) (1) and E.D. Mich. LR 72.1 (d) (2). Failure to file specific objections constitutes a waiver of any

further right of appeal. Thomas v. Arn, 474 U.S. 140 (1985); Howard v. Secretary of HHS, 932 F.2d 505, 508 (6th Cir. 1991); United States v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981). A party must timely raise all objections it may have to the Report and Recommendation in order to preserve those objections for further review. Willis v. Secretary of HHS, 931 F.2d 390, 401 (6th Cir. 1991); Smith v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987) ("making some objections but failing to raise others will not preserve all the objections a party may have"). Pursuant to E.D. Mich. LR 72.1 (d) (2), a party must serve the objections upon the magistrate judge.

Within ten (10) days of service of a party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length, unless by motion and order the page limit is extended by the court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Virginia M. Morgan
UNITED STATES MAGISTRATE JUDGE

Dated: Dec 28, 2000.

TO: Keith Yohn
Debra A. Kowich

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

KEITH YOHN,
Plaintiff,

Case No: 99-75997
Honorable
Victoria A. Roberts

vs

BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN ET AL.,
Defendants.
_____/

ORDER ACCEPTING IN PART, AND REJECTING IN PART THE MAGISTRATE'S REPORT AND RECOMMENDATION; ENTERING JUDGMENT; (1) IN FAVOR OF DEFENDANTS ON PLAINTIFF'S 42 USC SEC. 1983 CLAIM; (2) IN FAVOR OF DEFENDANTS KOTOWICZ AND SHARPHORN ON DEFAMATION CLAIMS; (3) IN FAVOR OF DEFENDANTS ON INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM; AND, DISMISSING DEFAMATION CLAIM AGAINST STOFFERS WITHOUT PREJUDICE

II. BACKGROUND

A. Factual Basis for Plaintiff's 42 U.S.C. sec. 1983 & First Amendment Violation Claim

Plaintiff is a tenured Associate Professor at the University of Michigan, School of Dentistry. In early October 1999, Plaintiff was chosen as one of four professors to serve as a panel member to score the

practical projects of two (2) dental students enrolled in a clinical course. Both students had repeated the course, having failed it on a prior occasion. The practical project consisted of crafting a temporary bridge of acrylic material. After deliberating for approximately two and one half (21/2) hours, the panel unanimously agreed that both students had failed the test which corresponded to a letter grade of "F" in the dental School's grading system.

On October 6, 1999, the panel reported to Defendant Feigal, the Interim Associate Dean of the School of Dentistry, that both students earned an "F" on the practical exam. Subsequently, Defendant Feigal informed the panel members, including the Plaintiff, that the students would be allowed to re-do the temporary bridges and that they would be graded by other faculty members.[3] *(See, Defendant Stohler's deposition transcript, pgs 17-29)* The students performed the practical test again, crafting the temporary bridges, and were given passing grades. The "F" grades originally assigned by the panel were never

---

3 The record is not clear regarding exactly what transpired prior to the Executive Committee coming together to meet regarding the students' failing grade which prompted the opportunity for the students to re-take the practical portion of the exam (i.e., undergo a competency assessment). However, "[w]hen a grade dispute arises, there is a process available for students to appeal through the Academic Review Board, with an ultimate right to seek redress from the school Executive Committee. The Executive Committee is comprised of six members of the faculty who are elected by their colleagues, and the Dean, who only votes when there is a tie." *(See, Exhibit 17 of Plaintiff's Third Amended Complaint).* The father of one of the students was on the University of Michigan Faculty.

recorded on the students' official transcripts.

APPLICABLE LAW & ANALYSIS

A. Whether Plaintiff's Alleged Deprivation of Academic Freedom Under the First Amendment Constitutes a Valid Claim Pursuant to 42 U.S.C. sec. 1983

Section 1983 provides that:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any . . . person within the jurisdiction [of the United States] to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured." *42 U.S.C. sec. 1983*

Therefore, an actionable Section 1983 claim must allege a deprivation of rights secured by the Constitution by a person acting under color of state law. *Daniels v. Williams,* 474 U.S. 327, 329-31 (1986) In order for Plaintiff in the instant case to have a valid claim under 42 U.S.C. sec. 1983, he must establish a deprivation of his First Amendment right to academic freedom.

An educator has a First Amendment constitutional right to academic freedom in issuing grades. *Jones v. Board of Education,* 1994 WL 45428 (Del. Super)"Because the assignment of a letter grade is symbolic communication

intended to send a specific message to the student, the individual professor's communicative act is entitled to some measure of First Amendment protection." *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989) "The freedom of the university professor to assign grades according to his own professional judgment is of substantial importance to that professor." *Id.* at 828 "Thus, the professor's evaluation of [his] students and assignment of their grades is central to the professor's teaching method." *Id.* It is upon this type of language that Plaintiff bases his claim, arguing that his right to academic freedom was violated when the grades he issued were administratively changed.

However, the law in the 6th Circuit makes clear that an educator's First Amendment right to academic freedom is violated only *when the educator himself or herself is compelled to change a student's grade. Id.* at 829.

Conversely, if a grade is changed administratively as opposed to requiring the educator to personally alter the grade marking, then such a situation does not rise to the level of a constitutional interest in a grade ultimately received by a student. *Id.* Cases support this distinction.[4]

---

[4] *Hillis v. Stephen F. Austin State University*, 665 F.2d 547 (5th Cir 1982) (professor's claim of violation of his First Amendment Academic Freedom Rights were without merit where student's grade was changed by the administration and the professor was not compelled to do so); *Keen v. Penson*, 970 F.2d 252, 257 (7th Cir, 1992) (noting with approval the lower court's holding that the giving of a grades not protected by the principle of academic freedom.); *Berg v Bruce*, 112 F.3d 322, 329 (8th Cir. 1997) (there is no First Amendment infringement upon a right to academic freedom absent any indication that the educator was ordered or compelled to change a particular grade)

In this case, Plaintiff has made no allegation that he was forced to change the students' grades. The facts clearly indicate that the change in the students' grades was an administrative one. Therefore, the evidence does not support a First Amendment violation of Plaintiff's right to academic freedom. Accordingly, his section 1983 claim will be dismissed with prejudice.

IT IS SO ORDERED.

_____

Victoria A. Roberts
United States District Judge

Dated: May 07, 2001.

No. 01-1734

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEITH YOHN,	)	
	)	
Plaintiff-Appellant,	)	
v.	)	**ORDER**
	)	
UNIVERSITY OF MICHIGAN	)	
REGENTS, et al.,	)	
Defendants- Appellees.	)	

Before: CLAY AND GILMAN, Circuit Judges;

HAYNES, District Judge.[5]

Keith Yohn, a university professor, appeals a district court grant of summary judgment for defendants in this civil rights action filed under 42 U.S. C. section 1983 with supplemental state law claims. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. Asp. P. 34(a).

Yohn filed his complaint and two amended complaints in the district court alleging that the defendant officials at

[5] The Honorable William J. Haynes, Jr. United States District Judge for the Middle District of Tennessee, sitting by designation.

the University of Michigan violated his First Amendment rights when they vacated failing grades that he assigned to two students on a practical exam project. Defendants moved to dismiss the complaint or for summary judgment, plaintiff responded in opposition, and defendants submitted a reply. The magistrate judge held a hearing, and recommended that the defendants' motion to dismiss be granted. After plaintiff filed objections, the district court adopted the magistrate judge's recommendation in part, rejected it in part, but granted defendants' motion and dismissed plaintiff's complaint. Plaintiff filed a timely notice of appeal.

On appeal, plaintiff contends that: (1) defendants violated his civil rights; (2) the decision relied upon by the district court, *Parate v Isibor,* 868 F.2d 821 (6th Cir. 1989), is distinguishable; and (3) the district court improperly dismissed his claim for intentional infliction of emotional distress with respect to two of the defendants. Defendants respond that the district court's judgment was proper. Upon de novo review, *see Allard v Weitzman (In re DeLorean Motor Co.),* 991 F.2d 1236, 1239-40 (6th Cit. 1993), we affirm the judgment for the reasons stated by the district court in its order accepting in part, and rejecting in part the magistrate's report and recommendation filed May 7, 2001.

This court has held that a university professor has no constitutional right to insist that a grade assigned by the professor cannot be changed by the university so long as the professor is not personally required to make the change. *See Parate,* 868 F.2d at 827-30. Plaintiff's attempt on appeal to distinguish the facts in *Parate* from the instant case is unavailing. Finally, the district court properly dismissed plaintiff's intentional infliction of emotional distress claim because plaintiff alleged nothing that can be deemed to meet the elements of a cause of action under Michigan law: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *See Roberts v. Auto-Owners Ins. co.,* 374 N.W. 2d 905, 908 Mich. 1985). Accordingly, plaintiff's claims on appeal lack merit.

For the foregoing reasons, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
Leonard Green
Clerk

FILED
Jun 24 2002
Leonard Green, Clerk

Supreme Court U.S.
FILED
OCT 7 2002
CLERK

No. 02-0191

In The
Supreme Court of the United States

KEITH YOHN,

Petitioner,

v.

STATE OFFICERS OF MICHIGAN DAVID A. BRANDON, Regent; LAURENCE B. DEITCH, Regent; DANIEL D. HORNING, Regent; OLIVIA P. MAYNARD, Regent; REBECCA McGOWAN, Regent; ANDREA FISCHER NEWMAN, Regent; S. MARTIN TAYLOR, Regent; KATHERINE E. WHITE, Regent; and their managerial agents WILLIAM E. KOTOWICZ, Dean; ROBERT J. FEIGAL, Interim Assoc. Dean; CHRISTIAN S. STOHLER, Dept. Chairman; BRIAN H. CLARKSON, Dept. Chairman; MERLE A. JAARDA and KENNETH W. STOFFERS, Co-Course Directors; in their individual capacities at State University in Ann Arbor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether only those issues appealed to the Sixth Circuit have been properly preserved for consideration by the Court.

II. Whether Petitioner has a constitutionally protected interest in the grade received by a student; whether *Parate v. Isibor* is dispositive of this case.

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CITATIONS OF OPINIONS AND ORDERS ENTERED

In the United States Court of Appeals for the Sixth Circuit:

Keith Yohn v. University of Michigan Regents, et. al., 2002 WL 1378212, No. 01-1734, (6th Cir. June 24, 2002) (unpublished disposition)

In the United States District Court for the Eastern District of Michigan:

Keith Yohn v. Board of Regents of the University of Michigan, et. al., Case No. 99-75997

Judgment, entered May 7, 2001 (unpublished)

Order Accepting in Part, and Rejecting in Part the Magistrate's Report and Recommendation, May 7, 2001 (unpublished)

Report and Recommendation, December 28, 2000 (unpublished)

STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner filed a complaint in the United States District Court for the Eastern District of Michigan on or about December 15, 1999, alleging a violation of his alleged Fourteenth Amendment "constitutionally protected property right" to report and have recorded a grade on a student's transcript. Subsequent amended complaints filed by Petitioner assert a "deprivation of [his] 'freedom of speech' right to report and have recorded a [grade]", along with state law emotional distress and defamation claims.

The district court granted Defendants summary judgment and/or dismissal and entered judgment in Defendants' favor on May 7, 2001.

Petitioner appealed to the Court of Appeals for the Sixth Circuit. On June 24, 2002, the Court of Appeals entered an order affirming the decision of the district court.

Jurisdiction in this Court is based upon 28 U.S.C. § 1254, which provides in relevant part

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;. . . .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Proceedings Below

This case arises out of the School of Dentistry at the University of Michigan. Petitioner L. Keith Yohn, a School of Dentistry tenured faculty member, filed his Complaint in the U.S. District Court for the Eastern District of Michigan on December 15, 1999, naming the Board of Regents of the University of Michigan and twelve individuals[1] as

[1] University of Michigan regents David Brandon, Laurence Deitch, Daniel Horning, Olivia Maynard, Rebecca McGowan, Andrea Fischer Newman, S. Martin Taylor, and Katherine White were named as well as University of Michigan School of Dentistry Dean William Kotowicz, Associate Dean Robert Feigal, and Professors Merle Jaarda and Kenneth Stoffers. All were initially named in "their individual and official capacities, jointly and severally." (R. 1, Complaint, caption).

defendants. (R. 1 Complaint).[2] Thereafter, Petitioner filed three amended complaints, adding various defendants and modifying his claims.[3] His third and final amended complaint alleged that the University's act of not recording a grade he assigned to a student violated his first amendment right to academic free speech and that various other related events at the School of Dentistry caused him emotional distress and defamed him.

The University moved for dismissal and/or summary judgment. On December 28, 2000, the magistrate judge issued a Report and Recommendation, recommending that the University's Motion For Dismissal and/or Summary Judgment be granted, the complaint dismissed, and

---

[2] Citations to the record are made by reference to the appropriate entry number from the district court docket as submitted to the Sixth Circuit, except where otherwise specified. Petitioner refused to include those portions of the district court record designated by the University in the appendix submitted to the Sixth Circuit, as he was required to do by F.R.A.P. 30 and 6th Cir. R. 30. Thus, no reference to the "joint" appendix is available to Respondents for certain of the items from the record cited herein. Therefore, in the interest of consistency, only references to the District Court record have been used.

[3] Petitioner's third amended complaint named the above twelve individuals, as well as Daniel Sharphorn, Assistant General Counsel of the University, and School of Dentistry Professors Christian S. Stohler and Brian Clarkson. Additionally, in his third amended complaint, he dismissed the Regents of the University of Michigan and all other named defendants in their official capacities. With the exception of Defendant Sharphorn, who Petitioner has not included as a party to this Petition, all of the Defendants identified are Respondents in this matter and will hereafter be referred to collectively as "the University".

judgment entered in the University's favor. (R. 84, Report and Recommendation).[4]

On May 7, 2001, the District Court entered an Order dismissing with prejudice Petitioner's federal claim, emotional distress claim, and state law defamation claim against Defendants Kotowicz and Sharphorn, and dismissing the state law defamation claim against Defendant Stoffers without prejudice. (R. 90, Order Accepting in Part and Rejecting in Part the Magistrate's Report and Recommendation). On the same date, judgment in favor of all Defendants was entered by the court. (R. 91, Judgment).

Petitioner appealed the District Court's decision to the Sixth Circuit Court of Appeals and raised only the following issues on appeal: 1) Whether the University's action in administratively changing a grade he assigned to a student violated his First Amendment right of free speech; 2) Whether the District Court erred in relying on *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989); and 3) Whether the District Court improperly dismissed his intentional infliction of emotional distress claim.

On June 24, 2002, the Sixth Circuit affirmed the judgment of the District Court, relying on the reasons stated by the District Court in its Order.

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[4] Plaintiff filed objections to the Magistrate's Report and Recommendation on January 8, 2001 (R. 87, Objections to Magistrate Judge's Proposed Findings of Fact and Recommendation in Dispositive Pretrial Matter), and subsequently filed a Request for a De Novo Redetermination of Magistrate Judge's Proposed Findings of Fact and Recommendation in Dispositive Pretrial Matter. (R. 89).

Statement of Facts

The facts asserted by Petitioner are, in large part, merely allegations taken from one or more of the complaints he filed in the District Court. Except to the extent that those facts are stated in the Report and Recommendation of the Magistrate Judge, the University does not concede that the matters asserted as fact by Petitioner are accurate or complete. For purposes of the Court's review of the Petition in this matter, however, it is unnecessary to address the veracity of most of the factual allegations Petitioner makes.

The only facts in the record of this matter which are relevant to this Petition are: Petitioner was among a group of four faculty members in the School of Dentistry asked to grade the practical examinations of certain students. (R. 32, Second Amended Complaint, p. 4; R. 62 Third Amended Complaint, p. 7). Petitioner and the other faculty members collectively submitted their assigned grades to Associate Dean Robert Feigal. (R. 32, Second Amended Complaint, p. 5; R. 62, Third Amended Complaint, p. 9). Subsequently, an administrative decision was made not to record the grades submitted by Petitioner and the other faculty members. (R. 32, Second Amended Complaint, p. 5; R. 62, Third Amended Complaint, p. 9). Finally, at no time was Petitioner asked to change the grade he submitted with the other faculty members. (R. 54, Deposition of L. Keith Yohn, p. 41).

ARGUMENT

I. ONLY THOSE ISSUES APPEALED TO THE SIXTH CIRCUIT HAVE BEEN PROPERLY PRESERVED FOR CONSIDERATION BY THE COURT.

Petitioner asserts five issues with no less than 18 sub-issues in his Petition. There is some redundancy across these questions and many are not properly framed legal issues, but rather are more appropriately characterized as sarcastic attempts at rhetoric (e.g., issue V.D. asks "Does inflating a student's grade teach the student to accept lower standards, whine, cheat, lie and steal?" and issue IV.C. inquires "Are patients concerned about having a dentist with inflated grades working in their mouths and the mouths of their children?"). However, Petitioner raised only the following issues on appeal to the Sixth Circuit: Whether the University violated his First Amendment rights in administratively changing a grade he assigned to a student; Whether *Parate v. Isibor*, *supra*, a Sixth Circuit case, was improperly relied upon; and Whether the District Court erred in dismissing his emotional distress claim.

It is well-settled that the Supreme Court will not address on certiorari issues not raised on appeal in the court of appeals. *See, G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 (1982) (holding that the Court would not address a violation of due process issue where the issue was not raised in the Court of Appeals); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from the federal courts that

questions not pressed or passed upon below are reviewed.") Exceptional circumstances have been found by the Court where there is "plain error." *See, e.g., United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947); *Mahler v. Eby*, 264 U.S. 32, 45 (1924).

The only "plain error" issue alleged in the Petition is whether it was plain error for the District Court to dismiss Petitioner's First Amendment claim without considering the University's reason(s) for changing the grade Petitioner assigned. (Issue II., page i of Petition). As with the first question he presented to the Sixth Circuit – whether his First Amendment rights were violated – this issue assumes that Petitioner has a cognizable constitutional interest in this situation. As is discussed in full, *infra*, he does *not* as a matter of law have a constitutionally protected interest in the grade ultimately received by a student. Thus, the "plain error" issue asserted by Petitioner may be disposed of in the same manner as the first question he appealed to the Sixth Circuit – by considering as a threshold matter whether Petitioner even has a cognizable constitutional interest.

A review of the Petition clearly indicates that Petitioner has not pursued further appeal of the dismissal of his emotional distress claim.[5] Therefore, the only issues properly before this Court are whether Petitioner's First Amendment rights were violated by the University and whether *Parate v. Isibor* is dispositive of this case.

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[5] There is no mention of the emotional distress claim in Questions Presented. Additionally, in the Appendix to the Petition, Petitioner has only reproduced portions of the District Court's 15-page order, omitting all sections which addressed his emotional distress claim.

II. PETITIONER DOES NOT HAVE A CONSTITUTIONALLY PROTECTED INTEREST IN THE GRADE RECEIVED BY A STUDENT; *PARATE V. ISIBOR* IS DISPOSITIVE.

Of the various issues set forth in the Petition as questions presented, none is analyzed or even identified in Petitioner's three- and one-half page argument. Instead, Petitioner simply provides lengthy quotes from *Parate v. Isibor* and five other cases from various circuits, alleging without analysis that these cases indicate a conflict among the circuits regarding "how much protection a scholastic grade should receive." When read correctly, however, these cases – indeed the very quotes from them offered by Petitioner – not only belie any conflict among the circuits, but in fact, they uniformly support the position advocated by the University, the recommendations of the magistrate judge, the order of the District Court, and the Sixth Circuit's affirmance of the District Court, concluding that there is no constitutional protection afforded to a professor for the grade ultimately received by a student.

In *Parate*, the Sixth Circuit considered the case of a university professor who was ordered by the dean of the school in which he taught to change the grade the professor had assigned to one of his students. The professor did, in fact, succumb to the pressure he received from the dean and changed the grade he submitted for the student. In deciding the case, the Sixth Circuit noted the academic freedom of a professor to *assign* grades according to his own judgment, but dismissed the notion that the professor enjoys any constitutional interest in the grade a student ultimately receives. *Id.* at 828-829. Thus, the court concluded that it was only the act of *compelling* the professor to change the grade, rather than administrators changing

the grade themselves, which implicated a constitutional interest of the professor. The court stated

> [W]e conclude that the constitutional issue was mischaracterized below. The defendants' act of *ordering Parate* to change the grade, rather than the act of giving Student "Y" a different grade than Parate desired, gives rise to the constitutional violation.
>
> . . . .
>
> Parate, however, has no constitutional interest in the grades which his students ultimately receive. If the defendants had changed Student "Y's" [ ] course grade, then Parate's First Amendment rights would not be at issue. [His] First Amendment right to academic freedom was violated by the defendants because they ordered *Parate* to change Student "Y's" original grade. The actions of the defendants, who failed to administratively change Student "Y's" grade *themselves*, unconstitutionally compelled Parate's speech and precluded him from communicating his personal evaluation to Student "Y." *Id.* at 829.

Petitioner has never alleged – in his pleadings, briefs, or otherwise – that anyone, among the current Defendants or otherwise, acting on behalf of the University of Michigan ever suggested, requested, insisted or compelled him to change his evaluation of the students' work or the grades he submitted. Rather, Petitioner rests his entire claim on the legally unsupported allegation that he enjoys a constitutional interest in the grade a student ultimately receives. As such, this case presents exactly the circumstance that *Parate* held does *not* implicate a constitutional interest of the professor.

In an effort to diminish the authoritative effect of *Parate*, Petitioner cites cases from other circuits, which he alleges establish a conflict among the circuits on this issue. While offering some factual variations, these cases uniformly reaffirm the rule that a professor has no constitutional interest in the grade received by a student. Indeed, to the extent that any of these cases deviate from *Parate*, it is only in that they refuse to go as far as *Parate*, even declining to recognize a constitutional right of a professor to *assign* grades as he sees fit.

For example, in *Lovelace v. Southeastern Massachusetts University, et al.*, 793 F.2d 419 (1st Cir. 1986), an untenured teacher alleged that his contract was not renewed because his grading policy deviated from the standards of the university. In affirming summary judgment for the defendants, the First Circuit stated

> Plaintiff also contends that the Federation Agreement guaranteed him academic freedom and this guaranty was violated by the university's alleged action in attempting to coerce plaintiff to alter grades. If that were so, plaintiff at most would state a contract claim, not a constitutional one. *Id.* at 426, fn. 2.

Similarly, in *Brown v. Armenti*, 247 F.3d 69 (3d Cir. 2001), a tenured professor alleged that he was suspended after refusing the university president's instruction to change a student's grade. In ruling that the defendant university president was entitled to summary judgment, the Third Circuit stated

> Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be

> taught. We therefore conclude that a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures. *Id.* at 75.

While the *professor* relied on *Parate* in asserting his claim, the Third Circuit rejected the rule of that case, stating that a "more realistic" view of the university-professor relationship requires that "[w]hether the school registrar is told that a student's performance rates an 'F' or an 'Incomplete' is not a matter that warrants the 'intrusive oversight by the judiciary in the name of the First Amendment.'" *Brown v. Armenti*, at 75, *citing*, *Connick v. Myers*, 461 U.S. 138, 146 (1983).

Petitioner next cites *Hillis v. Stephen F. Austin State University*, 665 F.2d 547 (5th Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982) for a generalized statement regarding the concept of academic freedom. However, Petitioner fails to note the holding of *Hillis*, where the Fifth Circuit concluded that the professor's refusal to assign a grade to a student as instructed by his department chair did not constitute a "teaching method" for which the professor enjoyed some measure of First Amendment academic freedom. *Id.* at 552-553.

In *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992), a student criticized the course requirements of a professor, both to him in class and to her classmates outside of the classroom. The professor sent the student various demeaning and insulting letters in an attempt to extract an apology from her. When she refused to apologize, he gave her an "F" grade. The university demoted the professor for this and other behavior. In discussing the relative academic freedom of a professor and a university, the Seventh Circuit noted "[t]his Court has recognized the supremacy

of the academic institution in matters of curriculum content." *Id.* at 257. The court also noted with approval the lower court ruling that the giving of a grade is not protected by the principle of academic freedom. *Id.*

Finally, in *Berg v. Bruce*, 112 F.3d 322 (8th Cir. 1997), a principal issued notices to one of his teachers regarding various complaints about her teaching methods and grades issued. The teacher refused to cooperate in addressing any of the principal's concerns or his efforts to remediate her practices and was thereafter terminated. In dismissing the teacher's allegations of a First Amendment right to assign grades as she saw fit, the Eighth Circuit considered *Parate*, but concluded consistent with that case that "[s]ince there is no evidence that [the principal] ordered or attempted to get [the teacher] to change any particular grade, . . . we need not consider whether the First Amendment gave [the teacher] the right to assign grades as she saw fit." *Id.* at 329.

Although there may be some difference across the circuits as to whether a professor's First Amendment rights are violated where he is forced to change a grade, this survey of the circuit courts initiated by Petitioner indicates there is absolute agreement that a professor has no constitutional interest in the grade a student ultimately receives. Thus, an administrative change of a grade, without the element of coercion, does not impact the professor's constitutional interest in any manner. Ironically, *Parate* – the very case Petitioner seeks to distinguish – is the only case that clearly recognizes a constitutional interest for a professor compelled to make a grade change and, as such, potentially affords a professor the greatest protection.

It remains, however, that there is no allegation of coercion in this case; in fact, Petitioner has specifically denied that he was ever asked to change the grade he submitted. He has, therefore, failed to articulate a constitutionally protected interest and failed to state a claim of violation of any cognizable constitutional right.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the petition for writ of certiorari in this matter.

Respectfully submitted,

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